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ARTICLE I

Les Hautes Parties Contractantes s'engagent à soumettre à l'arbitrage tous les différends de n'importe quelle nature qui viendraient à s'élever entre Elles et qui n'auraient pu être résolus par les voies diplomatiques. Elles s'adresseront à cet effet à la Cour permanente d'arbitrage, établie à la Haye par la Convention du 29 juillet 1899, à moins d'être convenues d'un tribunal arbitral différent.

ARTICLE IV

Il est entendu qu'à moins que la controverse ne porte sur l'application d'une convention entre les deux Etats, ou qu'il ne s'agisse d'un cas de déni de justice, l'article Ier ne sera pas applicable aux différends qui pourraient s'élever entre un ressortissant de l'une des Parties et l'autre Etat Contractant lorsque les tribunaux auront, d'après la législation de cet Etat, compétence pour juger le contestation.

Those treaties in the list which are not referred to in the foregoing notes make no reference to the Hague Tribunal.

## PROPOSED CONFERENCE FOR THE SETTLEMENT OF CERTAIN QUESTIONS OF MARITIME LAW

The Second Peace Conference at The Hague formulated a project for an international prize court upon the joint proposition of Germany, Great Britain, France, and the United States, and while the project as a whole has been viewed with favor there are not a few questions of importance which militate against the acceptance of the project and the passage of local legislation necessary to give it full effect. It is generally conceded that the establishment of an international prize court would mark a great advance in international law and procedure. For it is elementary that a party accused of an illegal seizure should not be permitted to pass in final resort upon the justness of his act. In the domain of private law the mere suggestion of the possibility of such a travesty on justice would be received with ridicule, yet international custom and usage permits the captor, in courts constituted by him and with judges appointed by him and owing to him allegiance, to determine the validity of the capture, seizure, or confiscation. The conference at The Hague, in establishing a court, opposed international to national judgment, and by composing the court primarily of neutrals, with representation, however, of belligerents, sought to test the validity of the capture by permanent and disinterested judges trained in the law. The advantages and supposed objections to the institution of an international prize court have been fully set forth in the leading articles in

this number. The present editorial comment will deal with one article of the proposed convention — namely, the seventh — which has given rise to much comment and no little criticism, and to consider which Great Britain has summoned a conference of representatives of the maritime powers to meet in London in October, 1908.

Article 7 is as follows:

If a question of law to be decided is covered by a treaty in force between the belligerent captor and a power which is itself or whose subject or citizen is a party to the proceedings, the court is governed by the provisions of the said treaty.

In the absence of such provisions, the court shall apply the rules of international law. If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity.

The above provisions apply equally to questions relating to the order and mode of proof.

If, in accordance with article 3 (2) (*c*), the ground of appeal is the violation of an enactment issued by the belligerent captor, the court will enforce the enactment.

The court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.

Such is the text of the article as voted by the Hague Conference after a careful explanation of its meaning and probable consequences contained in the admirable report of Mr. Louis Renault. The material portion of Mr. Renault's report follows:

What rules of law will the new prize court apply?

This is a question of the greatest importance, the delicacy and gravity of which can not be overlooked. It has often claimed the attention of those who have thought of the establishment of an international jurisdiction on the subject we are considering.

If the laws of maritime warfare were codified, it would be easy to say that the International Prize Court, the same as the national courts, should apply international law. It would be a regular function of the international court to revise the decisions of the national courts which had wrongly applied or interpreted the international law. The international courts and the national courts would decide in accordance with the same rules, which it would be supposed ought merely to be interpreted more authoritatively and impartially by the former courts than by the latter. But this is far from being the case. On many points, and some of them very important ones, the laws on maritime warfare are still uncertain, and each nation formulates them according to its ideas and interests. In spite of the efforts made at the present conference to diminish these uncertainties, one can not help realizing that many will continue to exist. A serious difficulty at once arises here.

It goes without saying that where there are rules established by treaty, whether they are general or are at least common to the nations concerned in the capture (the captor nation and the nation to which the vessel or cargo seized belongs), the international court will have to conform to these rules. Even in the absence of a formal treaty, there may be a recognized customary rule which passes as a tacit expression of the will of the nations. But what will happen if the positive law, written or customary, is silent? There appears to be no doubt that the solution dictated by the strict principles of legal reasoning should prevail. Wherever the positive law has not expressed itself, each belligerent has a right to make his own regulations, and it can not be said that they are contrary to a law which does not exist. In this case, how could the decision of a national prize court be revised when it has merely applied in a regular manner the law of its country, which law is not contrary to any principle of international law? The conclusion would therefore be that in default of an international rule firmly established the international court shall apply the law of the captor.

Of course it will be easy to offer the objection that in this manner there would be a very changeable law, often very arbitrary and even conflicting, certain belligerents abusing the latitude left them by the positive law. This would be a reason for hastening the codification of the latter in order to remove the deficiencies and the uncertainties which are complained of and which bring about the difficult situation which has just been pointed out.

However, after mature reflection, we believe that we ought to propose to you a solution, bold to be sure, but calculated considerably to improve the practice of international law. "If generally recognized rules do not exist, the court shall decide *according to the general principles of justice and equity.*" It is thus called upon to *create the law* and to take into account other principles than those to which the national prize court was required to conform, whose decision is assailed by the international court. We are confident that the judges chosen by the powers will be equal to the task which is thus imposed upon them, and that they will perform it with moderation and firmness. They will interpret the rules of practice in accordance with justice without overthrowing them. A fear of their just decisions may mean the exercise of more wisdom by the belligerents and the national judges, may lead them to make a more serious and conscientious investigation, and prevent the adoption of regulations and the rendering of decisions which are too arbitrary. The judges of the international court will not be obliged to render two decisions contrary to each other by applying successively to two neutral vessels seized under the same conditions different regulations established by the two belligerents. To sum up, the situation created for the new prize court will greatly resemble the condition which has long existed in the courts of countries where the laws, chiefly customary, were still rudimentary. These courts made the law at the same time that they applied it, and their decisions constituted *precedents*, which become an important source of the law. The most essential thing is to have judges who inspire perfect confidence. If, in order to have a complete set of international laws, we were to wait until we had judges to apply it, the event would be a prospective one which even the youngest of us could hardly expect to see. A scientific society, such as the Institute of International Law, was able, by devoting twelve years to the work, to prepare a

set of international regulations on maritime prizes in which the organization and the procedure of the international court have only a very limited scope. The community of civilized nations is more difficult to set on foot than an association of jurisconsults; it must be subject to other considerations or even other prejudices, the reconcilement of which is not so easy as that of legal opinions. Let us therefore agree that a court composed of eminent judges shall be intrusted with the task of supplying the deficiencies of positive law until the codification of international law regularly undertaken by the governments shall simplify their task.

The ideas which have just been set forth will be applicable with regard to the order of admission of evidence as well as to the means which may be employed in gathering it. In most countries arbitrary rules exist regarding the order of admission of evidence. To use a technical expression, Upon whom does the burden of proof rest? To be rational one would have to say that it is the captor's place to prove the legality of the seizure that is made. This is especially true in case of a violation of neutrality charged against a neutral vessel. Such a violation should not be presumed. And still the captured party is frequently required to prove the nullity of the capture, and consequently its illegality, so that in case of doubt it is the captured party (the plaintiff) who loses the suit. This is not equitable and will not be imposed upon the international court.

What has just been said regarding the order of evidence also applies to the means of gathering it, regarding which more or less arbitrary rules exist? How can the nationality, ownership, and the domicile be proven? Is it only by means of the ship's papers, or also by means of documents, produced elsewhere? We believe in allowing the court full power to decide.

Finally, in the same spirit of broad equity, the court is authorized not to take into account limitations of procedure prescribed by the laws of the belligerent captor, when it deems that the consequences thereof would be unreasonable. For instance, there may be provisions in the law which are too strict with regard to the period for making appeal or which enable a relinquishment of the claim to be too easily presumed, etc.

There is a case in which the international court necessarily applies simply the law of the captor, namely, the case in which the appeal is founded on the fact that the national court has violated a legal provision enacted by the belligerent captor. This is one of the cases in which a subject of the enemy is allowed to appeal. (Art. 3, No. 2 *c*, at end.)

Article 7, which has thus been commented upon. is an obvious proof of the sentiment of justice which animates the authors of the draft, as well as of the confidence which they repose in the successful operation of the institution to be created.

It will be seen that the court is vested not merely with judicial but with legislative power; that it not only interprets and develops the law, it does what the conference could not do — namely, it legislates, and establishes a code of maritime international law.

The second paragraph of article 7 provides that in the absence of

treaty stipulations between the litigants the court shall apply the rules of international law, which would be an adequate provision if the rules of international law were codified. The paragraph goes on to say: "If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity." Here, however, is the crux of the question, for recognized rules of international law exist, and have long existed, on certain important matters, but they are in conflict. For example, Anglo-American jurisprudence recognizes the doctrine of continuous voyages; so do the French and Italian. The continental view generally is against the validity of continuous voyages. The rules therefore exist and are generally recognized as existing. To come to a conclusion, the court must in an appropriate case accept or reject the doctrine of continuous voyages. This means that the court not only establishes a principle from a mass of evidence, but that it chooses from among generally recognized and conflicting principles of international law that which it considers as most in accordance with the general principles of justice and equity. In a word, the court is intrusted with the high mission of codifying international law, a task which some of the nations wish to assume and complete, leaving to the court the duty of interpreting the code thus established.

The example given is merely one of many. For instance, there are involved (1) questions of contraband, penalties for its carriage, the immunity of ships from search when under convoy, and the question with regard to compensation where vessels have been seized but have been found in fact only to be carrying innocent cargoes; (2) questions of blockade, involving the locality where seizure can be effected and the notice necessary to be given before the ship be seized; (3) the doctrine of continuous voyage, which originated in the domain of contraband but has been extended during the American civil war to blockade; (4) the question of the destruction of neutral vessels prior to condemnation in a prize court; (5) the question as to neutral ships or persons rendering unneutral service; (6) the question of the conversion of merchant ships into warships upon the high seas; (7) the transfer of merchant ships from a belligerent to a neutral flag during or in contemplation of hostilities; (8) whether the domicile or nationality be adopted in determining the enemy character of property.

The fundamental nature of these problems is apparent from their mere enumeration, and the great difficulty and delicacy of their adjustment is equally obvious when it be mentioned that many of these doctrines were

considered at great length in detail and with feeling at the recent Hague Conference, without an approach to general agreement. It is therefore highly desirable that a special conference should take into consideration these questions, and it seems equally desirable that this conference should be composed of the maritime powers which in the past have made and enforced the law and which must in the very nature of things develop it in the future.

Great Britain has outlined a program which contains the various subjects mentioned, and Austria-Hungary, France, Germany, Italy, Holland, Japan, Russia, Spain, and the United States of America have been invited to send representatives. The work of the conference will be watched with great interest because the fate of the prize court is understood to depend, so far as Great Britain is concerned, upon a satisfactory decision of the difficulties presented. Should the conference fail to reach definite conclusions, its work will not be lost, because the Third Peace Conference at The Hague, which is scheduled to meet in about the year 1915, will be obliged to undertake the codification of international maritime law, in order that a code of maritime law may be prepared which will be acceptable to all nations, because accepted by all. Successful or unsuccessful, the work of the London conference must be considered as a preliminary step and as such of the greatest importance.

### THE FIRST CASE BEFORE THE CENTRAL AMERICAN COURT OF JUSTICE

In the months of November and December, 1907, the Central American Peace Conference was in session at Washington, and on December 20 adjourned, after having concluded a treaty of peace and eight conventions and protocols governing the future relations of the five Central American States.[1] Among these conventions was one for the establishment of a permanent court of justice to which the five nations "bind themselves to submit all controversies or questions which might arise among them, of whatsoever nature, and no matter what their origin may be, in case the respective Departments of Foreign Affairs should not have been able to reach an understanding."

In accordance with the provisions of this convention the five countries appointed their representatives on the court as follows: Costa Rica, Hon. José Astúa Aguilar; Guatemala, Hon. Angel M. Bocanegra; Salvador, Hon. Salvador Gallegos; Honduras, Hon. Alberto A. Ucles; and

[1] Published in the Supplement of the January issue, at page 219.